Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–57 OF 2000

ABDUL HAMID MOHAMAD FCJ, MOHD GHAZALI JCA AND FAIZA THAMBY CHIK J

5 SEPTEMBER 2003

Bankruptcy — Notice — Notice of intention to oppose — Creditor's petition — Whether sufficient to file notice in Form 16 (r 117) of the Bankruptcy Rules 1969 — Whether summons in chambers should be filed under r 18 of the Bankruptcy Rules 1969 — Bankruptcy Rules 1969 rr 18, 117, Form 16

The judgment debtor in this case filed a notice of intention to oppose the creditor's petition in that he disputed the amount of debt owing. The senior assistant registrar dismissed the application. The judgment debtor filed a notice of appeal. A preliminary objection was raised in that the notice of intention to oppose the petition had not complied with r 18(1) of the Bankruptcy Rules 1969 ('the Rules'). The issue for consideration was whether, in opposing a creditor's petition, it was sufficient for a notice of intention to oppose the creditor's petition to be filed; or wheher the judgment debtor had also to file a summons in chambers pursuant to r 18 of the Rules.

Held, allowing the appeal:

(1) Where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form 16, by virtue of r 117, specifying the statements in the petition which he intends to deny or dispute. However, where the debtor wants to apply to set aside the petition on other grounds, eg for non-compliance with the rules regarding the petition, only then must a summons in chambers be filed. This is because such grounds arise separately from the statements in the petition and therefore cannot be specified in the notice (see paras 32, 37).

(2) In the instant case, a notice of intention to oppose the creditor's petition pursuant to r 117 was filed. That was sufficient to entitle the debtor to oppose the petition. He did not have to file a further summons in chambers (see para 38).

[**Bahasa Malaysia summary**

Penghutang penghakiman di dalam kes ini telah memfailkan satu notis niat untuk membangkang petisyen si piutang kerana beliau telah mempertikaikan jumlah wang yang terhutang. Penolong kanan pendaftar telah menolak permohonan itu. Penghutang penghakiman telah memfailkan notis rayuan. Satu bantahan awal telah dibangkitkan bahawa notis niat untuk membangkang petisyen tidak mematuhi k 18(1) Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah itu'). Isu untuk dipertimbangkan adalah sama ada di dalam membangkang petisyen si piutang, ia adalah memadai untuk notis niat untuk membangkang petisyen si piutang difailkan; ataupun sama ada penghutang penghakiman perlu memfailkan saman dalam kamar menurut k 18 Kaedah-Kaedah itu.

Diputuskan, membenarkan rayuan itu:

(1) Di mana penghutang penghakiman hanya hendak menunjuk kausa terhadap petisyen, beliau hanya perlu memfailkan notis di dalam Borang 16, mengikut k 117, menyatakan pernyataan di dalam petisyen yang beliau ingin menafikan atau mempertikaikan. Walau bagaimanapun jika penghutang hendak memohon untuk mengenepikan petisyen itu atas alasan-alasan lain, seperti ketidakpatuhan kepada kaedah-kaedah berkenaan petisyen itu, saman dalam kamar perlu difailkan pada masa itu. Ini adalah kerana alasan-alasan sebegini bangkit secara berasingan daripada pernyataan di dalam petisyen dan tidak dapat dinyatakan di dalam notis (lihat perenggan-perenggan 32, 37).

(2) Di dalam kes ini, satu notis niat untuk membangkang petisyen si piutang menurut k 117 telah difailkan. Ini memadai untuk memberi hak kepada penghutang untuk membangkang petisyen itu. Beliau tidak perlu memfailkan saman dalam kamar lain (lihat perenggan-perenggan 38).]

Notes

For cases on notice of intention to oppose, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2238–2239.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)
Ngan Chin Wen, Re; Ex p Moscow Norodny Bank Ltd [1995] MLJU 159; [1996] 2 CLJ 943 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 5(1), (2)
Bankruptcy Rules 1969 rr 18(1), 95(2), 117, Forms 7, 16, 17
Rules of the High Court 1980 O 14, O 18 r 19

K Balaguru (Paul Ong and Olivia Ho with him) (Paul Ong & Assoc) for the appellant.
CS Kumar (Desmond Ng and YT Lim with him) (Shui Tai) for the respondent.

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] On 14 April 1998, Jupiter Securities Sdn Bhd, the judgment creditor in the High Court and the respondent here ('the judgment creditor') obtained summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against Dato'' Sri Teong Teck Leng, the judgment debtor in the High Court and the appellant here ('the judgment debtor') and another person by the name of Loh Kon Wah. The judgment debt was for RM2,460,377.66 and interest of RM161,003.15, further interest and costs.

[2] On 2 July 1998, a request for a bankruptcy notice to be issued against the judgment debtor was filed.

[3] On 14 September 1998, the bankruptcy notice was personally served on the judgment debtor.

[4] On 30 September 1998, the judgment debtor filed a summons in chambers (encl 5) for an order that the whole of the bankruptcy proceedings not limited to the creditor's petition and the bankruptcy notice dated 2 July 1998 be struck out and set aside.

[5] Alternatively, it was prayed that the whole of the bankruptcy proceedings be stayed until the disposal of the notice of appeal to the judge in chambers dated 17 April 1988 against the summary judgment dated 14 April 1988 is disposed off.

[6] There was no mention under which rule the application was made, but it must have been under r 18 of the Bankruptcy Rules 1969 ('the Rules').

[7] On 22 December 1998, a creditor's petition dated 15 December 1988 (encl 10) was filed.

[8] On 23 February 1999, encl 5 was heard and dismissed with costs.

[9] On 24 February 1999, a notice of appeal to the judge in chambers was filed against the order dismissing encl 5.

[10] On 1 April 1999, the creditor's petition was served on the judgment debtor.

[11] On 8 April 1999, the judgment debtor filed a notice of intention to oppose the creditor's petition (encl 13). The ground stated in the notice was:

> ... I intend to dispute any outstanding sum owing to the judgment creditor amounting to the said RM2,842,321.61.

[12] So, the only ground of objection was that the judgment debtor disputed the amount of the debt as stated in the creditor's petition.

[13] On 19 April 1999, the judgment debtor filed an affidavit in support of the notice of intention to oppose the creditor's petition.

[14] On 24 September 1999, the senior assistant registrar ('SAR') heard and dismissed enclosure 13, ie the notice of intention to oppose the creditor's petition.

[15] On 27 September 1999, the judgment debtor filed a notice of appeal to the judge in chambers against the order of 24 September 1999.

[16] On 15 October 1999 the SAR heard the creditor's petition (encl 10). Adjudicating and receiving orders were made.

[17] On 18 October 1999, the judgment debtor filed a notice of appeal to the judge in chambers (encl 35) against the order of the SAR made on 15 October 1999.

[18] On 12 May 2000 Steve LK Shim J (as he then was) dismissed the appeal on a preliminary objection raised by the learned counsel for the judgment creditor.

[19] The judgment debtor appealed to this court.

[20] It should be noted that the learned judge decided on a preliminary objection that the notice of intention to oppose the creditor's petition had not complied with r 18(1) of the Rules. The learned judge cited a passage from the judgment of Mohd Dzaiddin SCJ (as he then was) in *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 at pp 304–305:

> Looking at the appellant's 'affidavit in opposition', it appears that he had jumbled up every conceivable ground of opposition he could think of in this affidavit, which not only includes grounds raised in encl 3, but also the submissions of law and pleas for the court to exercise its discretion judicially and in the interest of justice. Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counterclaim or set-off or cross-demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18 … . In our opinion, *failure on the part of the appellant to follow r 18 renders his 'affidavit in* opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set off or cross-demand which equals or exceeds the judgment debt, *must be made by filing a notice of motion supported by an affidavit*. (Emphasis added.)

[21] The learned judge then went on to say:

> It seems clear from the parts underscored above that, in his Lordship's view, any challenge to the creditor's petition under r 117, (on grounds other than the existence of a counterclaim, set-off or cross-demand, has to be made by filing a notice of motion (now a summons in chambers), supported by an affidavit pursuant to r 18. Given the legal position enunciated by the highest judicial authority, I have to conclude that the filing of the notice of intention to oppose the creditor's petition in the instant case, in which the JD is merely disputing the amount claimed by the JC, constitutes a challenge to the creditor's petition and therefore it is incumbent on the JD to file a summons in chambers supported by an affidavit in compliance with r 18 Bankruptcy Rules. The JD has obviously failed to do so. It is insufficient for the JD to merely file in the said notice of intention to oppose.

[22] From the grounds of judgment, that was the only ground on which the learned judge decided the case without considering the merits of the petition.

[23] Before us, besides attacking the judgment on that ground, Mr K Balaguru, learned counsel for the judgment debtor also submitted that the receiving order and the adjudicating order should not have been made simultaneously. The learned judge did not deal with this issue.

[24] The minutes of the proceedings do not reflect what transpired before the learned SAR, who heard the petition and made the receiving order and adjudicating order. The notice of appeal to the judge in chambers, by its nature or form, does not contain any indication whether that was one of the grounds of appeal to the judge in chambers. So we do not know what was actually argued before him. Again, in an appeal to a judge in chambers, a memorandum of appeal is not required to be filed. So again, we are unable to know from the memorandum of appeal whether that was one of the grounds of the appeal to the judge in chambers.

A **[25]** The notes of proceedings recorded by the learned judge showed that, at the outset of the submissions before him, the learned counsel for the judgment debtor said that he wished to raise four points, one of which was that the learned SAR ought not to have granted an adjudicating order at the hearing of the creditor's petition. To that ground, learned counsel for the judgment creditor replied that it should not be canvassed as it was only **B** made known to him the previous day. To that objection, learned counsel for the judgment debtor replied that he could not have raised it before the SAR as he would not know the mind of the SAR. Learned counsel for the judgment creditor then informed the court that he was not ready to submit on that ground due to the short notice. The appeal to the judge in chambers **C** was then adjourned to 5 April 2000.

[26] On 5 April 2000, learned counsel for the judgment debtor began his submission by raising the preliminary submission mentioned earlier. It is to be noted that both counsel only argued on the preliminary objection. No mention was made of the ground that both the receiving order and the adjudicating order should not have been made simultaneously. At the end **D** of their submissions, the learned judge recorded that he thought that the preliminary objection was 'a significant one'. So, he reserved his decision to 12 May 2000 on which date he delivered his judgment dismissing the appeal with costs. He also recorded 'Preliminary Objection sustained'.

E **[27]** It is clear therefore, why, in his judgment, the learned judge did not deal with that ground, but only with the preliminary objection.

[28] Coming back to the main ground raised in the preliminary objection, the issue is simply whether, to oppose a creditor's petition, it is sufficient that a notice of intention to oppose the creditor's petition be filed or must the judgment debtor also file a summons in chambers pursuant to r 18 of **F** the Rules.

[29] Before going any further, it is worthwhile to mention that there are two stages in a bankruptcy proceeding, namely, the notice stage and the petition stage. In this appeal, we are only concerned with the petition stage. How does a judgment debtor show cause against the creditor's petition? Is it **G** sufficient for him to file a notice of intention to oppose the creditor's petition (Form No 17, r 117)? Must he also file a summons in chambers under r 18?

[30] Rule 117 provides:

> Where a debtor intends to show cause *against a petition* he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or **H** dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard. (Emphasis added.)

[31] The form provided is Form No 16. The substantive part of the form merely provides:

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> I, the above …, do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, as the case may be) .

[32] In our view, where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form 117 specifying the statements in the petition which he intends to deny or dispute. That is all he has to do. This has been correctly pointed out by James Foong J in *Re Ngan Chin Wen; Ex p Moscow Norodny Bank Ltd* [1995] MLJU 159; [1996] 2 CLJ 943.

[33] In that case, the judgment debtor filed a notice to oppose the petition pursuant to r 117 of the Rules followed by an affidavit alleging that he had satisfied the judgment debt by paying a sum of US$200,000 to the petitioning creditor as full and final settlement of the judgment debt. The judgment debtor had not made an application or file an affidavit to set aside the bankruptcy notice within seven days of the service of the bankruptcy notice pursuant to s 3(1)(i) of the Bankruptcy Act 1967 ('the Act'). The learned judge held that by filing a notice to oppose the petition pursuant to r 117, the judgment debtor had a right to be heard even though he had not complied earlier with s 3(1)(i) of the Act. However, the judgment debtor's opposition at the hearing must be confined strictly to matters provided under ss 5(1) and 6(2) of the Act.

[34] The problem faced by the learned judge in the instant case actually arose from three words, ie 'bankruptcy petition or' in the judgment of Mohd Dzaiddin SCJ in *Datuk Lim Kheng Kim v Malayan Banking Bhd* that was quoted by him. The sentence '… challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim must be made by filing a notice of motion supported by an affidavit' has been understood by the learned judge to mean that even to show cause against a petition, a summons in chambers under r 18 must be filed.

[35] Perhaps, it is unfortunate that both creditor's petition and bankruptcy notice were mentioned in the same sentence. But if we bear in mind the two stages, the confusion could be avoided. It is also quite unfortunate that the mention of 'counterclaim' etc immediately after the words 'challenges to the creditor's petition or bankruptcy notice … gives the impression that, a challenge on the ground that a debtor has a counterclaim etc may be made at the creditor's petition stage. That is not so and cannot be so because such a challenge may only be made at the bankruptcy notice stage, in fact within seven days after the service of the bankruptcy notice. And, until that issue is determined, no act of bankruptcy is deemed to have been committed (r 95(2)) which would mean that the creditor's petition cannot even be filed yet. This is confirmed in *Datuk Lim Kheng Kim*.

[36] So, the reference to counterclaim etc in that passage only refers to a challenge to the bankruptcy notice. Such challenge may be made by filing an affidavit in Form No 7 under r 95. But, a challenge to the bankruptcy notice on other grounds may only be made by filing a summons in chambers under r 18.

[37] As we have said earlier, the inclusion of the words 'creditor's petition or' in that sentence is rather unfortunate. But, we think that even that can be explained if we draw a distinction between 'to show cause against a petition' and 'to challenge a petition'. In the case of the former, the method is provided by r 117 (Form No 16). But, where the debtor wants to apply

A to set aside the petition on other grounds, eg for non-compliance with the rules regarding the petition, then a summons in chambers must be filed. This is understandable because such grounds arise separately from the statements in the petition and therefore cannot be 'specified' in the notice (Form No 16). The difference between the two may be likened to a defendant in a civil suit who wants to defend the action and a defendant who wants to strike out the writ and the statement of claim. In the case of the former, he merely files a statement of defence. In the latter case, he has to file a summons in chambers under O 18 r 19 of the RHC.

[38] In the instant case, a notice of intention to oppose the creditor's petition pursuant to r 117 was filed. That would be sufficient to entitle the debtor to oppose the petition. He does not have to file further a summons in chambers for the purpose. We are of the view therefore that the judgment of the learned judge cannot be supported and the appeal should be allowed and the case be remitted back to the High Court for further hearing of the appeal to the judge in chambers on merits, which had not been done. We also think that it is premature for us to decide on the second issue, ie whether an adjudicating and a receiving order can be made at the same time. The parties had not argued the issue before the learned judge and the learned judge had not decided on it. We would like to clarify that this further hearing of the appeal need not be heard by the same judge (as he then was) who had heard this appeal.

[39] We also note that in the instant case, the learned SAR first heard encl 13 (notice of intention to oppose the creditor's petition) and after deciding on encl 13, heard the creditor's petition three weeks later.

[40] We are of the view that there should be no separate hearing of the notice of intention to oppose the creditor's petition. It is to be considered at the hearing of a creditor's petition, just as a statement of defence is not heard separately from the hearing of the claim. It may be different in the case of an application by way of a summons in chambers to strike out the creditor's petition. Even then, for the sake of expediency, unless, for some reasons, it is not practical, the summons in chambers should be heard together with the creditor's petition.

[41] We also note that the learned judge heard the appeal purely on the preliminary objection. This practice, as far as possible, should be avoided. It delays the disposal of the petition. This case is a good example. Five years after the commencement of the bankruptcy proceedings, this court is only hearing and deciding an appeal on the preliminary objection.

[42] We hereby allow the appeal with costs here and in the court below and order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Mariette Peters-Goh